

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.

Debtors

CASE NO. 96-61376

Chapter 11

Substantively Consolidated

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court has before it the Second Application For Allowance of Interim Compensation and Reimbursement of Expenses ("Second Fee Application") of George L. Davis ("Davis"). The Second Fee Application, which was filed on July 23, 1997 and covers the period March 1, 1997 through May 31, 1997, seeks a fee of \$85,015 together with disbursements in the sum of \$1,650.88.

Davis was retained pursuant to an Order of this Court dated February 6, 1997, generally

to provide the Court with expert testimony in support of the Chapter 11 Trustee's opposition to the various motions seeking relief from the stay filed by numerous bank creditors in this substantively consolidated cases. On October 24, 1997, the Court made a provisional award of \$20,000 in connection with the Second Fee Application.

The United States Trustee ("UST") has filed an objection to the Second Fee Application which appeared on a motion calendar of this Court held August 12, 1997, at Syracuse, New York. The attorneys for the official Committee of Unsecured Creditors also appeared, but did not interpose any objection to the Second Fee Application.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b) and 157(a), (b)(1) and (b)(2)(A) and (O).

FACTS AND DISCUSSION

Davis asserts that during the period referenced in the Second Fee Application, he prepared his testimony in declaration form for several evidentiary hearings held in connection with bank motions seeking relief from the automatic stay (11 U.S.C. § 362(d)). In order to prepare his testimony he reviewed documents produced by the banks and examined the transcripts of depositions of various bank representatives. Additionally, he seeks compensation for time consumed in actually preparing for and attending the hearings.

The UST contends that the hourly rate of \$475 charged by Davis is excessive, especially in light of the duplicative nature of Davis' services. As an example, the UST points to Davis' preparation of thirteen declarations during the instant reporting period which were "arguably very similar". (See Objection of UST dated July 13, 1997 at ¶ 3). The UST also points out that Davis "routinely charged the estate approximately 8 hours for each court appearance and 1½ hours for pre-trial preparation (on day of hearing). (*Id.* at ¶ 4)

In response to the criticism of the UST, the Chapter 11 Trustee's counsel defends the time Davis devoted to the preparation of his declarations asserting that while certain portions of the declarations are duplicative, the balance of each one is tailored to the lending practices of the specific bank. The Trustee's counsel also defends Davis' appearance at several hearings at which the various banks' counsel waived his cross examination, contending that the intent to waive cross examination was not timely communicated to Davis via the Trustee's counsel.

Analyzed purely from the perspective of benefit to the estate, Davis' testimony has been of very limited value as is evident from several banks' declination to even cross examine him. Additionally, this Court in its recent decisions on the banks' motions has rejected the very legal issue for which Davis' testimony was proffered.

Viewed however in light of 11 U.S.C. § 330(3)(c), this Court is prohibited from applying hindsight to the Davis Second Fee Application nor can the fees of an expert witness be denied payment simply because a court chooses not to give significant weight to the testimony proffered by that witness.

In defense of Davis' numerous appearances at evidentiary hearings in which he was not required to testify, Trustee's counsel lays blame on the banks' counsel suggesting that if they had

simply notified Davis in advance of the hearing that they did not intend to cross examine him, his trip to Utica, New York could have been avoided.

In examining the time records supplied by Davis, the Court is compelled to delete the following time increments as not being within the scope of his employment:

3/10/97 - Review audit footnotes, Bennett Funding Group (financial reports)	:1.25 hrs.
3/11/97 - Discussion M. Alas (Coopers & Lybrand) re: accounting conventions	:15 min.
3/12/97 - Review Trustee's 10/4/96 letter to lending banks	:35 min.
3/14/97 - Review Affidavit of T. Lunsden and related exhibits from substantive consolidation motion (i/c/w background for trial testimony)	:2.30 hrs.

Turning to the time devoted by Davis to the preparation of approximately thirteen declarations during period covered by this Second Fee Application, the Court notes that preparation of the average each declaration consumed some 4½ to 5 hours or \$2,138 to \$2,375.¹ The UST asserts that the declarations are “arguably very similar” and an analysis of them appears to support that assertion. Paragraphs 1 through 85 of each declaration are identical. The declarations also contain between six and eleven additional identical paragraphs and on average contain a total of 105 paragraphs.

The Court calculates that approximately \$40,000 of the total fee requested is directly attributable to the preparation of Davis' declarations and that while the Court may have awarded

¹ The Court notes that with regard to Howard Bank, Davis actually committed almost 14 hours to the preparation of this declaration.

full compensation for limited declaration preparation on a prior interim fee application, the Court will not at this juncture award fees of \$40,000 for what was for the most a repetitious exercise.²

The Court, in reliance upon the rationale of the U.S. Court of Appeals for Second Circuit in *In re Agent Orange Product Liability Litigation*, 818 F.2d 266, 237-38 (2nd Cir. 1987) will reduce the time attributable to preparation of the various declarations by 30%. While the Second Fee Application is by no means voluminous, the Court concludes that in spite of Code § 330(a)(3)(c), the time expended by Davis in connection with preparation of the various declarations did not confer a commensurate benefit on the estate.

In conclusion, the Court will disallow compensation of \$1,923.75 for the services reflected on 3/10/97, 3/11/97, 3/12/97 and 3/14/97 absent further explanation of relevance to the Davis assignment. In addition, the Court will disallow 30% or \$12,000 for the services rendered in connection with preparation of declarations. The Court will make no adjustment to this Second Fee Application for the hourly rate sought by Davis nor for the 9½ hours routinely charged by Davis for Court preparation and appearance though the Court cautions that in the future every effort should be made by both the Trustee and a respective bank movant to avoid Davis' appearance at a hearing where cross examination is to be waived.

The UST has also mounted a vague challenge to Davis' expense reimbursement without any specifics. The UST asserts that Davis did not travel "at a standard economy level". (*See* Objection of UST dated July 31, 1997 at ¶ 5).

While the Court is unable to reach the same conclusion as the UST, the Court does note

² The Court acknowledges that Davis did have to review the depositions of the respective bank officers and include certain allegations specific to the particular declaration.

that the summary of travel costs attached to the Second Fee Application as part of Exhibit A appears to be only partially supported by the receipts attached thereto (e.g. at least two of the air travel invoices reference airfare from New York City to Chicago and approximately \$1,000 per round trip flight.) The Court requests that Davis file a Supplemental Request for travel cost reimbursement within thirty (30) days of this Order and the Court will reconsider same.

In conclusion, the Court will award total fees of \$71,091.25 in fees and withhold approval of expenses as noted herein. The Court authorized a provisional award to Davis by Order dated October 24, 1997, which if paid will be credited to the Trustee with the balance payable from unencumbered funds.

IT IS SO ORDERED.

Dated at Utica, New York

this 13th day of January 1998

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge